Supreme Court, U.S.
FILED

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No. 06-_____ 06-377 SEP 14 2006

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In The

Supreme Court of the United States

THE METSCH LAW FIRM, P.A.,
f/k/a Metsch & Metsch, P.A.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did a criminal forfeiture under 21 U.S.C. § 853(n) operate to negate a pre-existing attorney's retaining lien, which had been imposed pursuant to Florida law during the pendency of the United States of America's civil action under 18 U.S.C. § 1345, against the proceeds of the sale of the clients' real property?

PARTIES TO THE PROCEEDING

The petitioner is The Metsch Law Firm, P.A., formerly known as Metsch & Metsch, P.A. ("the Metsch law firm") The Respondent is the United States of America ("the Government").

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of Petitioner's stock.

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18 U.S.C. § 1345 ..... 3, 6, 23

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OPINIONS BELOW

The decision of the Court of Appeals (Case No. 05-17071) is not reported in the Federal Reporter, Third Series. However, it can be found at 2006 WL 1785338 and is reprinted at Pet. App. 1a. The decision of the District Court (Case No. 03-Civ-21059) is unreported and is reprinted at Pet. App. 4.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 2006. This petition is being filed within ninety days thereafter. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

THE STATUTES INVOLVED

Section 853(n), Title 21, United States Code, is entitled "third party interests" and provides:

> (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.
>
> (2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States

pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

Section 1345, Title 18, United States Code, is entitled "Injunctions Against Fraud" and provides:

(a)(1) If a person is –

(A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title;

(B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title); or

(C) committing or about to commit a Federal health care offense;

the Attorney General may commence a civil action in any Federal court to enjoin such violation.

(2) If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court –

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to–

(I) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and

(ii) appoint a temporary receiver to administer such restraining order.

> (3) A permanent or temporary injunction or restraining order shall be granted without bond.
>
> (b) The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Mr. Orlando Fuentes ("Fuentes") and Ms. Meilin Valdes ("Valdes"), husband and wife, in February, 1999, purchased Unit No. 102, Building 41, El Prado XV Condominium, plus a proportionate interest in the common elements, as described in a Declaration of Condominium recorded in Official Record Book 16490, Page 1163 of the Public Records of Miami-Dade County, Florida, a/k/a Apt. 102-41, 7990 West 34th Lane, Hialeah, Florida 33108, Folio No. 04-2028-055-0550 ("the condominium apartment").

Fuentes and Valdes, on April 29, 2003, owned the condominium apartment, which was encumbered by a first mortgage held by GMAC Mortgage Corporation (Loan No. 306621792) securing a promissory note the principal

balance of which was $10,962.75. On that date, invoking 18 U.S.C. § 1345, the Government filed a civil action in the U.S. District Court for the Southern District of Florida against Fuentes and his corporation, Emily Medical Equipment, Inc. ("Emily Medical"), Valdes and her corporation, Professional Services Supplies, Inc. ("Professional Services"), and several other individuals and corporations. *United States of America v. Brickell Orthopedic Store, Inc., et al.*, Case No. 03-21059-Civ-Jordan, S.D. Fla., Miami Division.

Simultaneously with the filing of its Complaint For Temporary Restraining Order, Preliminary And Permanent Injunction, the Government moved, without notice to Fuentes and Valdes, for a temporary restraining order and a preliminary injunction. The District Court, proceeding *ex parte*, on April 29, 2003, entered a Temporary Restraining Order ("the TRO").

The TRO "froze" the funds on deposit in the following bank accounts held by Fuentes:

(a) Washington Mutual Bank, Account No. 3801424023.

(b) Washington Mutual Bank, Account No. 3746734884.

Further, the TRO "froze" the funds on deposit in (a) Ocean Bank, Account No. 101016463405, owned by Emily Medical and (b) Wachovia Bank, Account No. 2090002581085, owned by Professional Services.

In addition, the TRO enjoined Fuentes and Valdes from "alienating, withdrawing, transferring, dissipating or otherwise disposing of, in any manner, assets, real or

personal, in which any of defendants acquired an interest after January 1, 2000."

On April 29, 2003, Valdes maintained an account in each of two (2) banks not mentioned in the TRO: (a) Dade County Federal Credit Union, and (b) Washington Mutual Bank. Valdes, on April 30, 2003, by means of cashiers' checks, withdrew $45,000.00 from the former account and $25,000.00 from the latter account, which checks were deposited on May 1, 2003, in the Metsch law firm's trust account.

Fuentes and Valdes, represented by the Metsch law firm, on May 16, 2003, moved for the release of their frozen assets to enable them to pay living expenses and attorneys' fees. In that motion, Fuentes and Valdes disclosed that:

> On May 8, 2003, the law firm of Metsch & Metsch, P.A. ("the Metsch law firm"), recorded a [second] mortgage, encumbering the condominium apartment, to secure a $100,000.00 promissory note executed by Fuentes and Valdes in favor of the Metsch law firm for legal services to be rendered to them in this case and in the upcoming criminal proceedings described in [Assistant United States Attorney David A.] Frank's two (2) "target letters" of May 2, 2003. That [second] mortgage was filed under Clerk's File No. 20030301138, at Official Record Book 21237, Page 3263 of the Public Records of Miami-Dade County, Florida. Fuentes and Valdes are attempting to sell the condominium apartment.
>
> Aside from the foregoing $70,000 on deposit in the Metsch Trust Account, the Metsch law firm has yet to receive, from any source, payment for the professional services which it has rendered to

> date or which it may render in the future to Fuentes and Valdes.

The District Court, on May 27, 2003, issued a Preliminary Injunction, ¶ 9 of which provided:

> that pending final resolution of motions for living expenses and attorneys' fees, the $70,000 held in the trust account of Lawrence Metsch, Esq., shall be deposited in the registry of the court. The funds must be deposited by June 2, 2003. In the meantime, those funds may not be disbursed, moved, transferred, withdrawn, used as collateral, or otherwise affected without express written permission of the court.

On May 27, 2003, the District Court entered a separate order denying, without prejudice, the motion of Fuentes and Valdes for the release of frozen assets for living expenses and attorneys' fees. That order in pertinent part stated:

> Even if I were to follow the traditional preliminary injunction standard – and consider the balance of hardships – I find that the defendants must, at a minimum, prove their living expenses before engaging in any substantive analysis over whether they are entitled to such expenses. The defendants have so far failed to provide any evidence in support of their motion. Insofar as attorneys' fees are concerned, the defendants have not indicated how much money they intend on using for such fees. Accordingly, their motion is denied without prejudice. If the defendants decide to refile their motion, they must provide some support – i.e., affidavits, documentation, or something similar – for the expenses which they are requesting.

The Metsch law firm, on May 29, 2003, in compliance with the Preliminary Injunction, issued its Trust Account Check No. 1352, in the sum of $~0,000.00, and delivered it to the Clerk of the District Court.

Fuentes and Valdes, on June 6, 2003, filed their affidavit in support of their May 16, 2003, motion for the release of their frozen assets. On June 12, 2003, Fuentes and Valdes filed a supplement to their May 16, 2003, motion which advised the District Court that:

> Attached hereto as Composite Exhibit "A" are copies of the documents which evidence the June 10, 2003, sale by Defendants Orlando Fuentes ("Fuentes" and Meilin Valdes ("Meilin") to Mr. Julio Llanes of the following described real property: Unit No. 102, Building 41, Phase 2 of El Prado XV, a Condominium, according to the declaration of condominium thereof as recorded in Official Records Book 16490, Page 1163, of the Public Records of Miami-Dade County, Florida; a/k/a Unit 102-41, 7990 West 34th Lane, Hialeah, Florida 33108; Folio No. 04-2028-055-0550. In accordance with the Court's oral instructions of June 11, 2003, the $91,150.45 proceeds of the foregoing transaction have been deposited in the Metsch & Metsch, P.A., Trust Account, Account No. 031145055, Mellon United National Bank, 44 West Flagler Street, Miami, Florida 33130.

Included in Composite Exhibit "A" was a copy of the June 10, 2003, satisfaction of the May 7, 2003 mortgage executed by the Metsch law firm, which satisfaction was recorded on June 13, 2003, under Clerk's File No. 2003R0383554 in Official Record Book 21328, Page 922, of the Public Records of Miami-Dade County, Florida.

The District Court, on July 24, 2003, issued an order which granted Fuentes and Valdes $2,831.00 in monthly living expenses for one month. In addition, at pp. 2-3, the July 24, 2003, order stipulated that:

> The supplement to the motion filed by the defendants provides proof of sale of their investment property, a condominium unit located at 7990 West 34th Lane, Apartment 102-41, Hialeah, Florida 33108. The defendants now seek to use the proceeds of the sale – $91,150.45 – to pay for legal fees. In their motion the defendants aver to the fact that they purchased the condominium in February of 1999. The preliminary injunction only freezes assets in which the defendants acquired an interest after January 1, 2000. The defendants, however, have failed to identify how much equity they had accumulated in the condominium prior to January 1, 2000. Moreover, as stated in the prior order, the government is entitled to freeze not only the proceeds of the fraud but also equivalent assets under 18 U.S.C. § 1345. *See United States v. DBB, Inc.*, 180 F. 3d 1277, 1283-84 (11th Cir. 1999). Accordingly, the $91,150.45 acquired from the sale of the condominium must remain frozen under the preliminary injunction.
>
> Furthermore, the defendants are not entitled to a release of any of their funds for attorneys' fees at this time. The defendants are required to meet two burdens in order to reach frozen assets for attorneys' fees. First, the defendants must demonstrate that any funds released for attorneys' fees are derived from a legitimate source. *See generally Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) ("A defendant has no Sixth Amendment right to spend another

> person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice"); *SEC v. Quinn*, 997 F. 2d 287, 289 (7th Cir. 1993) ("Just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of crime." (internal citations omitted). *But see SEC v. Duclaud Gonzalez De Castilla,* 170 F. Supp. 2d 427, 429-30 (S.D.N.Y. 2001) (allowing for a modification of an asset freeze for attorney's fees under the balance of hardships standard). Second, the defendants must account for how much they are paying in fees – i.e., the hourly rate and the estimated hours required – and demonstrate that those fees are reasonably necessary. The defendants have so far failed in both respects. (Footnotes omitted)

The Metsch law firm, on August 8, 2003, moved for leave to withdraw as counsel for Fuentes, Valdes and their corporations. In that motion, the Metsch law firm stated:

> On July 24, 2003, the Court entered an order in this case, a copy of which is attached hereto as Exhibit "A". In that order, the Court (with a minor exception) denied the motion of Defendants Orlando Fuentes and Meilin Valdes for the release of their frozen funds, thereby enabling them to pay living expenses and attorneys' fees in this case and in the imminent criminal prosecution against them. Mr. Fuentes and Ms. Valdes have advised the Metsch law firm that they have no unfrozen money with which to pay attorneys' fees.
>
> The Metsch law firm has received no compensation for its services in this case. In light of the

> Court's July 24, 2003, order, the Metsch law firm reasonably anticipates that it will never be paid for its services. Under these circumstances, it should be granted leave to withdraw as counsel for the above-named defendants.

On August 8, 2003, the Metsch law firm filed its Notice Of Intention To Impose An Attorneys' Retaining Lien Against Trust Account Funds. The text of that notice follows:

> The law firm of Metsch & Metsch, P.A. ("the Metsch law firm"), hereby gives notice of its intention to impose an attorneys' retaining lien, in the sum of $22,621.60, against the $91,150.45 in proceeds of the sale of a condominium apartment now held in the Metsch law firm's trust account.
>
> Attached hereto as Exhibit "A" is an itemized listing of the professional services rendered and expenses incurred in the course of the Metsch law firm's representation of the following Defendants: Emily Medical Equipment, Inc., Professional Services Supplies, Inc., Orlando Fuentes and Meilin Valdes. *See, Daniel Mones, P.A. v. Smith,* 486 So. 2d 559, 561-562 (Fla. 1986).

The District Court, on August 12, 2003, granted the Metsch law firm's motion for leave to withdraw as counsel for Fuentes, Valdes and their corporations.

The Metsch law firm, on August 13, 2003, moved for the enforcement of its attorneys' retaining lien and instructions for the disposition of trust funds. On August 29, 2003, the Government filed its response in opposition.

The District Court, on March 18, 2004, entered an Omnibus Order which in pertinent part provided:

On August 19, 2003, after obtaining new counsel, Emily, Professional, Mr. Fuentes, and Ms. Valdes filed an opposition memorandum to Mr. Metsch's motion to enforce the retaining lien objecting to the retaining lien because "some of the charged time amounts were unnecessary, some were performed against the defendants' express instructions, and some reflect an excessive amount of time spent from the time actually spent." Defendants' Response at 1. The government also filed objections to Mr. Metsch's lien claim, arguing that the requested funds were the specific subject of the July 24, 2003, order, which mandates that they remain frozen under the preliminary injunction.

It is unclear whether Mr. Metsch's claim to a retaining lien on the proceeds from the sale of the condominium is valid, and I refuse to allow enforcement at this time. "In Florida an attorney has a right to a retaining lien upon all of the client's property in the attorney's possession, including money collected for the client . . . Unlike a charging lien, a retaining lien covers the balance due for all legal work done on behalf of the client regardless of whether the property is related to the matter for which the money is owed to the attorney." *Daniel P. Mones v. Smith*, 486 So. 2d 559, 561 (Fla. 1986) (internal citations omitted). The right of Mr. Metsch to assert a retaining lien on his former clients' property, however, assumes the legitimacy of the clients' ownership of that property. As explained in my order of July 24, 2003 – in which I denied Mr. Fuentes and Ms. Valdes' first request to use these same monies to pay attorney's fees – some of the equity of the condominium may have been funds by the proceeds in the fraud. Thus, the fact

that the property was purchased prior to January 1, 2000 (beyond the scope of the preliminary injunction) does not mean that a portion of its equity is not the proper subject of the preliminary injunction. *See* Order of July 24, 2003 at 2 & n.3. In the present motion, Mr. Metsch has failed to identify how much equity the defendants had accumulated in the condominium prior to January 1, 2000. Since my prior order, moreover, Mr. Metsch has presented no new arguments as to why these assets were not properly included in the preliminary injunction. Without evidence of ownership of the equity of these funds, Mr. Metsch cannot currently enforce his lien on these assets. *Cf. Law Office of Tony Center v. Baker*, 366 S.E. 2d 167, 168 (Ga. App. 1988) (refusing to permit attorney's lien on child support payments because the client had no right to use these monies to pay attorneys' fees).

In addition, even if some or all of Mr. Metsch's retaining lien is valid, now is not the time for its enforcement. "[T]he claims of lien of the attorney . . . [are] equitable in nature . . . They cannot be used as a sword to force an inequitable situation." *Goethal v. First Properties Int'l Ltd.*, 363 So. 2d 1117, 1121 (3rd DCA 1978) (citing *Nichols v. Kroelinger*, 46 So. 2d 722 (Fla. 1950)). At the present time, Mr. Metsch's former clients dispute the necessity and reasonableness of the attorney's fees alleged. The resolution of this dispute, and the question of the legitimacy of ownership, are not efficiently resolved at this time. Accordingly, Mr. Metsch's motion is denied without prejudice.

Omnibus Order, pp. 6-7.

The Metsch law firm, on April 5, 2004, filed a notice of appeal from the Omnibus Order. The resulting appeal was assigned Case No. 04-11673 by the Clerk of the U.S. Court of Appeals for the Eleventh Circuit. On June 29, 2004, the Court of Appeals dismissed Case No. 04-11673 for lack of jurisdiction (lack of an appealable order or judgment).

On October 28, 2004, Fuentes and Valdes were indicted for (a) conspiracy to defraud the United States, commit health care fraud and pay kickbacks, (b) health care fraud, (c) conspiracy to commit money laundering, and (d) money laundering. *United States of America v. Orlando Fuentes and Meilin P. Valdes,* Case No. 04-20828-Cr-Jordan, U.S. District Court, S.D. Florida ("Case No. 04-20828"). In addition to the criminal charges, the indictment sought the forfeiture of $3,432,208 allegedly derived by Fuentes and Valdes from their fraudulent activities.

On March 4, 2005, in Case No. 04-20828, the Government and Fuentes entered into a written Plea Agreement, at page 4 of which Fuentes agreed to the forfeiture to the Government of the funds on deposit in the Metsch law firm's trust account. [D.E. 89] The Metsch law firm did not represent Fuentes in Case No. 04-20828 and was not a signatory to the Plea Agreement.

On March 4, 2005, in Case No. 04-20828, the Government and Valdes entered into a written Plea Agreement, at page 4 of which Valdes agreed to the forfeiture to the Government of the funds on deposit in the Metsch law firm's trust account. The Metsch law firm did not represent Valdes in Case No. 04-20828 and was not a signatory to the Plea Agreement.

The District Court, on May 10, 2005, in Case No. 04-20828, entered a Judgment In A Criminal Case against

Fuentes. That judgment imposed upon Fuentes a prison term of 37 months and ordered him to make restitution to the Government in the sum of $1,565,354.00.

On May 11, 2005, in Case No. 04-20828, the District Court entered a Judgment In A Criminal Case against Valdes. That judgment imposed upon Valdes a prison term of 37 months and ordered her to make restitution to the Government in the sum of $1,866,862.00.

The Metsch law firm, on May 24, 2005, in Case No. 03-21059, renewed its motion for an order enforcing its attorneys' retaining lien and providing instructions for the disposition of trust funds in its possession. On June 14, 2005, the Government filed its response in opposition.

The District Court, on May 26, 2005, in Case No. 04-20828, entered an Amended Judgment In A Criminal Case against Fuentes, which declared:

> All right, title and interest in the sum of $3,432,208.00 in United States currency, bank accounts, vehicles, and real property as more particularly identified in the United States' bill of particulars, filed on December 8, 2004, is hereby forfeited to the United States of America pursuant to Title 18, United States Code, Section 982(a)(7).

On May 26, 2005, in Case No. 04-20828, the District Court entered an Amended Judgment In A Criminal Case against Valdes which stated:

> All right, title and interest in the sum of $3,432,208.00 in United States currency, bank accounts, vehicles, and real property as more particularly identified in the United States' bill of particulars, filed on December 8, 2004, is

> hereby forfeited to the United States of America pursuant to Title 18, United States Code, Section 982(a)(7).

The District Court, on August 18, 2005, in Case No. 04-20828, entered a Final Order And Judgment Of Foreclosure pursuant to 21 U.S.C. § 853(n). That order in pertinent part provided:

> 1. On March 14, 2005, this Court entered a Preliminary Order of Forfeiture condemning and forfeiting the interest of defendant ORLANDO FUENTES and MEILIN P. VALDES (hereinafter referred to as "defendant") in the following property to the United States of America pursuant to 18 U.S.C. § 982(a)(1) and (a)(7):
>
> * * *
>
> b. Approximately $91,150 in proceeds from the sale of 7990 W. 34th Lane, Hialeah, Florida, presently held at Mellon United National Bank in the name of Metsch & Metsch, P.A., trust account, account number 031145055;
>
> . . .
>
> 2. On April 21, 2005, Notice of the order forfeiting the property identified in the Preliminary Order was published in the *Miami Daily Business Review*, a newspaper of general circulation. The published notice stated the intent of the United States to forfeit all right, title and interest in, and to dispose of, the property identified in said Preliminary Order of Forfeiture; advised all third parties, if any, of their right to petition the Court within thirty days for a hearing to adjudicate the validity of their alleged legal interest in the property; and set forth the requirement that anyone seeking to claim an interest in the

property to be forfeited must file a petition in conformance with 21 U.S.C. § 853(n)(3), within thirty days after the earlier of the final date of publication of the notice or the receipt of actual notice.

3. The Proof of Publication of Notice of Forfeiture was filed with the Clerk of this Court on April 28, 2005.

4. All persons known to the United States to have a legal interest in the property ordered forfeited have thereby been notified according to 21 U.S.C. § 853(n)(1).

5. No third party has filed a timely petition for an ancillary hearing and the Court is not aware of any party having any interest in the property ordered forfeited by the Preliminary Order of Forfeiture identified herein above.

Accordingly, pursuant to 18 U.S.C. §§ 982(a)(1) and (a)(7) and 21 U.S.C. § 853(n) and for good cause shown, it is hereby ORDERED, ADJUDGED and DECREED that all right, title and interest in the following property:

* * *

b. Approximately $91,150 in proceeds from the sale of 7990 W. 34th Lane, Hialeah, Florida, presently held at Mellon United National Bank in the name of Metsch & Metsch, P.A., trust account, account number 0331145055;

. . .

* * *

is hereby forfeited to and clear title vested in the United States of America.

> The United States Marshals Service, or any other duly authorized law enforcement agents, shall dispose of the forfeited property in accordance with the law.

The District Court, on November 23, 2005, in Case No. 03-21059, denied the Metsch law firm's renewed motion to enforce its attorneys' retaining lien. Its order reasoned:

> Metsch & Metsch, P.A.'s ("Metsch") renewed motion for an order enforcing its attorney's charging [sic] lien and providing instructions for the disposition of trust funds in its possession is DENIED. On August 18, 2005, all right, title and interest in the $91,150.00 in the trust fund was forfeited to the United States of America. *See* Final Order and Judgment of Forfeiture, *United States v. Orlando Fuentes & Meilin P. Valdes,* Case No. 04-20828-CR-JORDAN at 3-5. Neither Metsch nor any other third party filed a petition for an ancillary hearing in that related criminal case, and thus, Metsch's lien is subordinate to the final criminal forfeiture judgment. *See* 21 U.S.C. 853(n)(2) (an innocent third party claiming an interest in property subject to forfeiture must file a timely petition for ancillary proceedings to protect his interest); *U.S. v. Puig,* 419 F. 3d 700, 704 (8th Cir. 2005) (court refused to reopen final criminal forfeiture judgment where third party's petition for ancillary proceedings was filed at least 30 days late); *United States v. McHan*, 345 F. 3d 262, 274 (4th Cir. 2003) ("property that is subject to forfeiture on account of the defendant's conviction . . . cannot escape forfeiture simply because the defendant transfers the forfeited property to a third party"). *Cf. United States v. Gilbert,* 244 F. 3d 888, 911 (11th Cir. 2005) (interpreting similar

> RICO forfeiture statute, if a third party does not file a petition for ancillary proceedings within thirty days of receipt or publication of notice, his rights in the defendant's forfeited property are automatically extinguished). Furthermore, Metsch's renewed motion does not cure the defect I found with its initial motion. Metsch does not show what portion of the trust fund money is not proceeds of the fraud. *See* Omnibus Order of March 18, 2004 at 5-7.

The Metsch law firm, on December 16, 2005, filed its notice of appeal with the Clerk of the District Court. Thereafter, the Eleventh Circuit assigned Case No. 05-17071 to the Metsch law firm's appeal.

On June 29, 2006, in Case No. 05-17071, the Court of Appeals issued its *per curiam* decision affirming the District Court's denial of the Metsch law firm's motion to enforce its attorney's retaining lien. The Court of Appeals reasoned:

> While the fact of the forfeiture does not moot this case, it is dispositive of this appeal. The district court correctly held that the criminal forfeiture operated to transfer all right, title and interest in the $91,150.00 in the trust account to the United States of America. Had Metsch wished to preserve any claim that it might have had to any of that money, it had to participate in the criminal forfeiture proceeding by filing a petition for ancillary proceedings within thirty days of the publication of the notice of forfeiture. 21 U.S.C. 853(n)(2). It is undisputed that Metsch filed no such petition. Therefore, any interest it may have had in the $91,150.00 in the trust account has been extinguished. *See* 21 U.S.C. 853(n)(7) ("if no such petitions are filed . . . the United

States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.").

REASONS FOR GRANTING THE WRIT

A. The decision of the Court of Appeals conflicts with the Supreme Court of Florida's decision in *Daniel Mones, P.A. v. Smith, supra.*

In *Daniel Mones, P.A. v. Smith,* 486 So. 2d 559, 561-562 (Fla. 1986), the Supreme Court of Florida declared:

> Turning now to the district court's denial of a retaining lien, we find the court erred in ruling that trust accounts are not subject to setoffs for past legal services rendered in unrelated cases. In Florida an attorney has a right to a retaining lien upon all of the client's property in the attorney's possession, including money collected for the client. *E.g., Dowda,* 452 So. 2d at 1142.[1] Unlike a charging lien, a retaining lien covers the balance due for all legal work done on behalf of the client regardless of whether the property is related to the matter for which the money is owed to the attorney. *Conroy v. Conroy,* 392 So. 2d 934 (Fla. 2d DCA 1980), *review denied,* 399 So. 2d 1141 (Fla.1981).
>
> The district court interpreted our decision in *The Florida Bar v. Bratton,* 413 So. 2d 754 (Fla.1982), as authority for the proposition that attorney's

[1] *Dowda and Field, P.A. v. Cobb,* 452 So. 2d 1140 (Fla. 5th DCA 1984).

> trust accounts are not subject to setoffs for past legal services rendered in unrelated cases. Such an interpretation of *Bratton* is unwarranted. In *Bratton* we ruled that an attorney cannot impose a valid retaining lien on client's funds entrusted to the attorney for a specific purpose where the parties have not agreed that fees should be paid out of the entrusted funds. In the case at bar the funds were not held for a specific purpose and, accordingly, *Bratton* is inapplicable.
>
> The district court's reliance on Florida Bar Integration Rule, article XI, rule 11.02(4) is also unjustified. Rule 11.02(4) expressly provides that it does not "preclude the retention of money or other property upon which the lawyer has a valid lien for his services or . . . preclude the payment of agreed fees from the proceeds of transactions or collections." This rule permits retaining liens on trust funds where otherwise valid. Accordingly, Mones is entitled to a retaining lien for the full balance of all fees still owed him up to the balance which remained in the trust account prior to its transfer to the court registry.

See, also, JLA Investment Corporation v. Colony Insurance Company, 922 So. 2d 249 (Fla. 2nd DCA 2006) (citing *Daniel Mones, P.A. v. Smith, supra,* and holding that former counsel for claimant was entitled to a retaining lien on settlement funds held in its trust account).

The Eleventh Circuit's decision in this case cannot be reconciled with the ruling in *Daniel Mones, P.A. v. Smith, supra.* Because the Court of Appeals "has decided an important federal question in a way that conflicts with a decision by a state court of last resort", *U.S. Supreme Court Rule 10(a),* this Court should grant the writ.

B. Nothing in the language or legislative history of 21 U.S.C. § 853(n) supports the proposition, adopted by the Court of Appeals, that a criminal forfeiture operates to negate a pre-existing attorney's retaining lien, which had been imposed under State law during the pendency of the Government's civil action under 18 U.S.C. § 1345, against the proceeds of the sale of the clients' real property.

Section 853(n)(6), Title 21, United States Code, speaks of only two (2) cases in which the Government's forfeiture claim can be defeated by the claim of a third party: (A) the third party's claim to the contested property had vested prior to the commission of the criminal acts upon which the forfeiture was premised, and (B) the third party qualified as a "bona fide purchaser for value". The Metsch law firm could satisfy neither criterion because it was engaged by Fuentes and Valdes after the commencement of the Government's civil action under 18 U.S.C. § 1345.

The Metsch law firm respectfully submits that, in the interest of promoting harmonious relationships between the Government and the several States, 21 U.S.C. § 853(n) should be construed so as not to negate a pre-existing attorney's retaining lien which had been imposed pursuant to applicable state law in the course of a civil action filed by the Government under 18 U.S.C. § 1345. Such a construction would be legitimate because: (a) neither the statutory language nor its legislative history addresses the circumstances presented by this case and (b) the Court of Appeals' predecessor, in *Adams, George, Lee, Schulte & Ward, P.A. v. Westinghouse Electric Corporation,* 597 F. 2d 570 (5th Cir. 1979), a diversity of citizenship action,

expressly acknowledged the applicability of Florida's common law establishing an attorney's retaining lien.[2]

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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LAWRENCE R. METSCH
FBN 133162

DATED: September 14, 2006

[2] In *Bonner v. City of Pritchard*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions that the U.S. Court of Appeals for the Fifth Circuit had handed down prior to the close of business on September 30, 1981.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-17071
Non-Argument Calendar

D.C. Docket No. 03-21059-CV-AJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

METSCH & METSCH, P.A.,

Interested Party-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 29, 2006)

Before ANDERSON, BIRCH and COX, Circuit Judges.

PER CURIAM:

Metsch & Metsch, P.A. ("Metsch") was counsel to two individual and two corporate defendants in this civil suit brought by the United States of America. During the course of the suit, $91,150 that had been placed in Metsch's trust account was frozen by injunctive order of the district court. Subsequently, the same $91,150 was the subject of a criminal forfeiture proceeding. Metsch did not

participate in the criminal forfeiture proceeding; instead, it collaterally attacked the forfeiture, arguing to the district court presiding over the civil case that Metsch is entitled to retain $22,621.60 of the trust monies as compensation for attorneys' fees. Metsch sought an order enforcing Metsch's attorneys' retaining lien in that amount. The district court denied Metsch's motion. Metsch appeals.

As a preliminary matter, we address our jurisdiction to consider this appeal. While the November 23, 2005 order is not a final judgment, it does fall within the limited class of collateral orders that are deemed final because it: (1) conclusively determines the dispute between Metsch and the Government, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from the final judgment. *See Pagan v. United States,* 353 F.3d 1343, 1345 (11th Cir. 2003). The Government argues that this appeal is moot because the monies in the trust account have already been forfeited to the United States. However, Metsch asserts that its lien has priority over the interest the United States derived from the forfeiture. Thus, a real controversy exists and this case is not moot.

While the fact of the forfeiture does not moot this case, it is dispositive of this appeal. The district court correctly held that the criminal forfeiture operated to transfer all right, title and interest in the $91,150.00 in the trust account to the United States of America. Had Metsch wished to preserve any claim that it might have had to any of that money, it had to participate in the criminal forfeiture proceeding by filing a petition for ancillary proceedings within thirty days of the publication of the notice of forfeiture. 21 U.S.C. 853(n)(2). It is undisputed

that Metsch filed no such petition. Therefore, any interest it may have had in the $91,150.00 in the trust account has been extinguished. *See* 21 U.S.C. 853(n)(7) ("if no such petitions are filed . . . the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.").

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO, 03-21059-CIV-JORDAN

UNITED STATES OF AMERICA,	)
Plaintiff	)
vs.	)
BRICKELL ORTHOPEDIC STORE, INC., et al.,	)
Defendants.	)

ORDER

(Filed Nov. 23, 2005)

Metsch & Metsch, P.A.'s ("Metsch") renewed motion for an order enforcing its attorney's charging lien and providing instructions for the disposition of trust funds in its possession [D.E. 363] is DENIED, On August 18, 2005, all right, title and interest in the $91,150.00 in the trust fund was forfeited to the United States of America. *See* Final Order and Judgment of Forfeiture, *United States v. Orlando Fuentes & Meilin P. Valdes,* Case No. 04-20828-CR-JORDAN [D.E. 116] at 3-5. Neither Metsch nor any other third party filed a petition for an ancillary hearing in that related criminal case, and thus, Metsch's lien is subordinate to the final criminal forfeiture judgment. *See* 21 U.S.C. 853(n)(2) (an innocent third party claiming an interest in property subject to forfeiture must file a timely petition for ancillary proceedings to protect his interest); *U.S. v. Puig,* 419 F.3d 700, 704 (8th Cir. 2005) (court refused to re-open final criminal forfeiture judgment

where third party's petition for ancillary proceedings was filed at least 30 days late); *United States v. McHan,* 345 F.3d 262, 274 (4th Cir. 2003) ("property that is subject to forfeiture on account of the defendant's conviction ... cannot escape forfeiture simply because the defendant transfers the forfeited property to a third party"). *Cf. United States v. Gilbert,* 244 F.3d 888, 911 (11th Cir. 2005) (interpreting similar RICO forfeiture statute, if a third party does not file a petition for ancillary proceedings within thirty days of receipt or publication of notice, his rights in the defendant's forfeited property are automatically extinguished). Furthermore, Metsch's renewed motion does not cure the defect I found with its initial motion. Metsch does not show what portion of the trust fund money is not proceeds of the fraud. *See* Omnibus Order of March 18, 2004 [D.E. 148] at 5-7.

Metsch's motion for leave to file a reply in excess of the page limit [D.E. 375] is GRANTED *nunc pro tunc.* Metsch's memorandum in response to the defendants' motion to terminate the proceedings [D.E. 394] is thus MOOT.

DONE and ORDERED in chambers in Miami, Florida, this 22nd day of November, 2005.

/s/ Adalberto Jordan
Adalberto Jordan
United States District
Judge

Copy to: All counsel of record
Magistrate Judge Klein